

Decision **PROPOSED DECISION OF ALJ VIETH** (Mailed 7/28/2015)

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Order Instituting Investigation on the  
Commission's Own Motion into the  
Operations and Practices of Pacific Gas  
and Electric Company regarding Anti-  
Smart Meter Consumer Groups.

Investigation 12-04-010  
(Filed April 19, 2012)

**DECISION DENYING PETITION FOR MODIFICATION  
OF DECISIONS 13-04-012, 14-01-038 AND 14-09-019.**

**Summary**

We deny a petition for modification filed by Californians for Renewable Energy, Inc. (CARE) that concerns three decisions in our investigation into improper activities by Pacific Gas and Electric Company in the connection with its smart meter program: Decisions 13-04-012; 14-01-038; and 14-09-019. Part of CARE's request is moot, since the relief requested has already occurred. CARE has failed to justify the remainder of the relief requested; the factual support CARE asserts (improper emails in another proceeding) has nothing to do with the substantive or procedural issues in this investigation.

**1. Background and Procedural History**

In April 2012 the California Public Utilities Commission (Commission) opened an investigation into the activities of Pacific Gas and Electric Company (PG&E) based on a report by the Consumer Protection and Safety Division (CPSD, now known as the Safety and Enforcement Division). The report

followed public revelations that a PG&E employee, William Devereaux, who had led PG&E's smart meter program from October 2009 through October 2010, had used a false name to infiltrate online discussion groups hosted by several anti-smart meter activist organizations. Ultimately, in Decision (D.)13-04-012, the Commission approved a settlement proposed by three parties, CPSD, The Utility Reform Network (TURN), and PG&E. Californians for Renewable Energy, Inc. (CARE), Joshua Hart, EMF Safety Network, and Ecological Options Network opposed the settlement.

Subsequent decisions in this docket include D.14-01-038, which denied rehearing of D.13-04-012; D.14-04-025, which modified D.14-01-038 to remove an extraneous discussion; and D.14-09-019, which closed this docket in September 2014 after the issuance of the final decision in a series of intervenor compensation awards (D.13-10-065, D.13-10-066, D.14-08-052, D.14-09-018, and D.14-09-019).

In October 2014, we reopened this docket when CARE concurrently filed the instant petition for modification (petition) and an application for rehearing, both of them challenging the following three decisions: D.13-04-012, D.14-01-038, and D.14-09-019. We denied CARE's application for rehearing in D.14-12-027.

## **2. Relief Requested**

D.13-04-012. CARE asks the Commission to modify D.13-04-012 (the decision approving settlement) to broaden the scope, require additional discovery, and then, to hold hearings. CARE asks us, again, to bring into the scope of this docket two issues the original scoping memo declined to incorporate: (1) remediation for alleged invasion of privacy and divulging smart meter campaign strategy and (2) whether or not PG&E made required ex parte filings in a different docket, Application (A.)10-04-018. D.13-04-012 states:

The scoping memo determines that these issues are beyond the scope of this investigation, points out that the Commission generally lacks jurisdictional authority to order money damages or other remedies for tortious harm to individuals, and observes that concerns about ex parte communications in A.10-04-018 should be raised in that docket in accordance with procedural options available under the Commission's Rules of Practice and Procedure. (D.13-04-012 at 6.)

We examine this request further in Section 3 of today's decision.

D.14-01-038. CARE asks the Commission to modify D.14-01-038 (the first decision denying rehearing) to revisit the discussion in III.A.1 and III.A.2 of that decision. The discussion in III.A.1 concerns Rule 12.2, which governs the showing required for the Commission to hold hearings on a contested settlement. We discuss this request further in Section 3 of today's decision. With respect to III.A.2 of D.14-01-038, CARE's request is moot, however. In April 2014 the Commission removed that discussion as "unnecessary dicta" when it granted TURN's timely-filed application for rehearing of D.14-01-038. (D.14-04-024, Ordering Paragraph 1.) Nothing remains of III.A.2 and so there is nothing that could be modified.

D.14-09-019. CARE asks the Commission to modify D.14-09-019 (the decision closing this docket after the last intervenor compensation award). This request is moot as the docket is now open. Consistent with Commission practice, the filing of CARE's petition on October 6, 2014, triggered the administrative reopening of the docket.

### **3. Legal Standard**

Public Utilities (Pub. Util.) Code Section 1708 authorizes the Commission to "rescind, alter, or amend any order or decision made by it" after providing proper notice to the parties and an opportunity to be heard. This is an

extraordinary remedy. It must be exercised with care and in keeping with fundamental principles of res judicata since “Section 1708 represents a departure from the standard that settled expectations should be allowed to stand undisturbed.” (D.92058 (1980) 4 CPUC 2d 139 at 149-150.)

Rule 16.4 of the Commission’s Rules of Practice and Procedure (Rules) governs the filing of petition for modification, a procedural vehicle that “asks the Commission to make changes to an issued decision.” (Rule 16.4(a).) Rule 16.4 includes both procedural and substantive requirements.

As Section 2 of today’s decision explains, half of CARE’s petition is moot. The remainder raises two issues: under Rule 16.4(b), justification for the relief requested; and under Rule 16.4(d), timeliness. We examine these Rule 16.4 requirements in Section 4.

#### 4. Discussion

We begin our analysis by examining CARE’s requests for modification of D.13-04-012, which approved the settlement of this investigation, and of III.A.1 of D.14-01-038, the first decision denying rehearing.

Rule 16.4(b)<sup>1</sup> provides very specific guidance:

A petition for modification of a Commission decision must **concisely state the justification for the requested relief** and must **propose specific wording to carry out all requested modifications to the decision**. Any factual allegations must be supported with specific citations to the record in the proceeding or to matters that may be officially noticed. Allegations of new or changed facts must be supported by an appropriate declaration or affidavit. (*Emphasis added.*)

---

<sup>1</sup> For the reasons explained in Section 2 of today’s decision, CARE’s requests for modification of III.A.2 of D.14-01-038 and for modification of D.14-09-019 are moot.

CARE offers essentially the same justification for both requests, which fails for the reasons discussed below. Because CARE does not meet the justification requirements of Rule 16.4(b), we need not discuss the timing requirements of Rule 16.4(d).

D.13-04-012. CARE points to the existence of certain e-mails that were exchanged during January 2014 and, after their subsequent disclosure, were much discussed in the media – all prior October 2014, when CARE filed the instant petition. The e-mails include improper ex parte communications that exhibit PG&E's efforts to have an assigned administrative law judge (ALJ) removed from its pending Gas Transmission and Storage (GT&S) proceeding. CARE's petition discusses the e-mails and quotes from some of them; the petition also includes a very brief declaration executed by Michael E. Boyd, CARE's President, verifying the statements in the petition. But nothing in the petition or declaration explains how anything in the e-mails constitutes new or changed facts that warrant modification of D.13-04-012, a decision that the Commission issued some eight months before the e-mails occurred and one that concerns an entirely different proceeding and subject matter.

Simply put, CARE has shown no factual link between the Commission's adoption of the CPSD/TURN/PG&E settlement and the e-mails the following year about the ALJ assignment in the GT&S proceeding. CARE argues that the existence of the GT&S emails has tainted D.13-04-012 – and that the only effective relief is reexamination of that decision. CARE wants us to reopen D.13-04-012, to redefine the scope to include the two issues described above in Section 2 and to order further discovery and hold hearings. But conjecture without a shred of factual support does not meet the justification standard in Rule 16.4(b) and warrant the resource expenditures CARE's demands would place on the

Commission and the other parties. Absent a legally sufficient justification, the petition should be dismissed.

D.14-01-038, III.A.1. The discussion in III.A.1 of D.14-01-038 (the first decision denying rehearing) concerns Rule 12.2, which governs the showing required for the Commission to hold hearings on a contested settlement. CARE argues that the January 2014 ex parte contacts in the GT&S proceeding undermine D.14-01-038's determination to deny rehearing of D.13-04-012. CARE made the same argument in its October 2014 application for rehearing but we found no legal error in D.14-01-038 and denied CARE's rehearing request in D.14-12-027.

We should dismiss this part of CARE's petition, likewise. Nothing in the January 2014 e-mails concerns D.13-04-012, smart meter policy, or the grounds CARE and other parties asserted for rehearing of D.13-04-012. Again, CARE relies upon conjecture and fails to meet the requirement that it justify this aspect of its petition.

## **5. Comments on Proposed Decision**

The proposed decision in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. CARE filed comments on August 17, 2015; no reply comments were filed.

CARE, which cites at length from the proposed decision and from various e-mails released by PG&E in response to an ALJ ruling in the GT&S proceeding, fails to establish factual or legal error in the proposed decision. CARE's comments rely on extra record material (the e-mails) and as such, could be disregarded on that basis under Rule 14.3(c). We observe, however, that CARE's comments appear largely to be based on the incorrect assumption that *any*

e-mails between a regulated entity like PG&E and any Commission staff -- or other parties to a proceeding -- are improper *ex parte* communications unless served on all other parties to the proceeding. Pub. Util. Code §1701.1(c)(4) provides otherwise. That statute states, in relevant part:

**"Ex parte communication,"** for purposes of this article, means any oral or written communication between a **decisionmaker** and a person with an interest in a matter before the commission concerning **substantive**, but not procedural issues, that does not occur in a public hearing, workshop, or other public proceeding, or on the official record of the proceeding on the matter... "Person with an interest," for purposes of this article means any of the following ... (Emphasis added.)

CARE's comments do not reference any *ex parte* communications in I.12-04-010. Nor do CARE's comments reference any *ex parte* communications in any other proceeding that support its objection to the settlement approved in I.12-04-010.

While we have made no changes to the proposed decision in response to CARE's comments, we have corrected minor typographical errors.

## **6. Assignment of Proceeding**

Michel Peter Florio is the assigned Commissioner and Jean Vieth is the assigned ALJ in this proceeding.

### **Findings of Fact**

1. Regarding D.13-04-012, CARE shows no factual link between the Commission's adoption of the CPSD/TURN/PG&E settlement in April 2013 and the e-mails in January 2014 about the ALJ assignment in the GT&S proceeding.

2. Regarding III.A.1 of D.14-01-038, CARE shows no factual link between the e-mails in January 2014 about the ALJ assignment in the GT&S proceeding and the denial of rehearing of D.13-04-012 in April 2014.

3. Regarding III.A.2 of D.14-01-038, CARE's request is moot because D.14-01-038 deleted III.A.2 of D.14-01-038 in April 2014.

4. Regarding D.14-09-019, CARE's request is moot because the filing of CARE's petition on October 6, 2014, triggered the administrative reopening of this docket.

### **Conclusions of Law**

1. Pub. Util. Code § 1708 is an extraordinary remedy, which must be exercised with care and in keeping with fundamental principles of res judicata.

2. Two parts of CARE's petition for modification are moot: D.14-01-038, III.A.2 and D.14-09-019.

3. CARE has not met its burden of proof under Rule 16.4(b) to justify its petition for modification of D.13-04-012 or D.14-01-038, III.A.1.

4. Because CARE has not met its burden of proof, its petition for modification should be denied.

5. Because CARE fails to meet the justification requirements of Rule 16.4(b), we need not discuss the timing requirements of Rule 16.4(d).

6. This order should be effective immediately to provide certainty to the parties.



**O R D E R**

**IT IS ORDERED** that:

1. The *Petition For Modification of Decision 14-09-019, Decision 14-01-038, and Decision 13-04-012, of Californians for Renewable Energy, Inc.*, filed October 6, 2014, is denied.

2. Investigation 12-04-010 is closed.

This order is effective today.

Dated \_\_\_\_\_, at San Francisco, California.